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In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the decision of the Board of Immigration Appeals, which held that respondent is barred from eligibility for the relief of withholding of deportation because there are "serious reasons for considering" that, prior to his arrival in the United States, respondent "committed a serious nonpolitical crime," within the meaning of Section 243(h)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. 1253(h)(2)(C) (1994).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions and treaties involved	2
Statement	2
Summary of argument	14
Argument:	
The Board of Immigration Appeals correctly interpreted and applied the "serious nonpolitical crime" exception, 8 U.S.C. 1253(h)(2)(C), to deny respondent withholding of deportation	18
A. The Attorney General's interpretation of the serious nonpolitical crime exception merits substantial deference	19
B. The Board of Immigration Appeals reasonably concluded that the risk of persecution upon return is not relevant in determining whether the alien committed a serious nonpolitical crime	22
C. The Board reasonably concluded that respondent's offenses constituted serious nonpolitical crimes even though they were not "atrocious" in character	33
D. The Board reasonably concluded that respondent's offenses were serious nonpolitical crimes based on their nature and character, not their perceived necessity or success	38
E. Substantial evidence supported the Board's determination that respondent's violence constituted serious nonpolitical crimes	41
Conclusion	46
Appendix	1a

TABLE OF AUTHORITIES

Cases:

	Page
Arauz v. *Rivkind*, 845 F.2d 271 (11th Cir. 1988)	25
Bailey v. *United States*, 516 U.S. 137 (1995)	34
Bertrand v. *Sava*, 684 F.2d 204 (2d Cir. 1982)	27
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	19, 20, 22
Choeum v. *INS*, 129 F.3d 29 (1st Cir. 1997)	32
Deportation Proceedings for Joseph Patrick Thomas Doherty, 13 Opin. Legal Counsel 1 (1989), rev'd on other grounds, *Doherty* v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992)	21, 33, 35
Deportation Proceedings of Joseph Doherty, 12 Opin. Off. Legal Counsel 1 (1988)	35
Doherty v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd on other grounds, 502 U.S. 314 (1992)	25
Eain v. *Wilkes*, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981)	36, 40
Fiallo v. *Bell*, 430 U.S. 787 (1977)	21
Garcia-Mir v. *Smith*, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986)	23
Haitian Refugee Ctr., Inc. v. *Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 502 U.S. 1122 (1992)	27
INS v. *Abudu*, 485 U.S. 94 (1988)	21, 46
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	3, 5, 19, 20, 28
INS v. *Doherty*, 502 U.S. 314 (1992)	46
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992)	42
INS v. *Rios-Pineda*, 471 U.S. 444 (1985)	22, 39
INS v. *Stevic*, 467 U.S. 407 (1984)	2, 6, 40
INS v. *Wang*, 450 U.S. 139 (1981)	21
McMullen, In re, 19 I. & N. Dec. 90 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986)	18, 35
McMullen v. *INS*, 788 F.2d 591 (9th Cir. 1986)	13, 20, 33, 35, 36, 40, 43
Meunier, In re, 2 Q.B. 415 (1894)	35

Cases—Continued:

	Page
Ming v. *Marks*, 367 F. Supp. 673 (S.D.N.Y 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975)	6
Motes v. *United States*, 178 U.S. 458 (1900)	42
Ornelas v. *Ruiz*, 161 U.S. 502 (1896)	35-36, 41-42
Pierce v. *Underwood*, 487 U.S. 552 (1988)	21
Ramirez-Ramos v. *INS*, 814 F.2d 1394 (9th Cir. 1987)	25
Reno v. *Koray*, 515 U.S. 50 (1995)	30
Rodriquez-Coto, In re, 19 I. & N. Dec. 208 (BIA 1985)	24
Sale v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)	6, 28, 29
Smith v. *United States*, 508 U.S. 223 (1993)	34
United States v. *Aguilar*, 883 F.2d 662 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991)	27
United States v. *Granderson*, 511 U.S. 39 (1994)	34
United States v. *Monsanto*, 491 U.S. 600 (1989)	24
Webster v. *Doe*, 486 U.S. 592 (1988)	21

Treaties, statutes and regulations:

	Page
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* 6 U.S.T. 3516	37
Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565:	
art. 1, 24 U.S.T. at 568	37
art. 4, 24 U.S.T. at 569	37
art. 8, 24 U.S.T. at 571	37
Protocol I Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 16 I.L.M. 1391	37
art. 48, 16 I.L.M. at 1412	36
art. 51(2), 16 I.L.M. at 1413	36

Treaties, statutes and regulations—Continued: Page

Protocol II Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 37
art. 4, 16 I.L.M. at 1444 36-37
art. 13, 16 I.L.M. at 1447 36-37
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 ..... *passim*
art. I, 19 U.S.T. at 6261 ..... 27, 29a
art. I(A)(2), 19 U.S.T. at 6261 ..... 6, 30a
art. I(F), 19 U.S.T. at 6261 ..... 7, 33a
art. I(F)(a)-(c), 19 U.S.T. at 6263-6264 ..... 6-7, 33a
art. 33, 19 U.S.T. at 6276 ..... 7, 27, 29, 50a
art. 33(2), 19 U.S.T. at 6276 ..... 7, 50a
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224 ..... *passim*
art. I(1), 19 U.S.T. at 6225 ..... 6, 17a
art. I(2), 19 U.S.T. at 6225 ..... 6, 7, 27, 17a
arts. I-XI, 19 U.S.T. at 6225-6229 ..... 6, 17a-23a
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 4, 32
Tit. IV-B, 110 Stat. 1268:
§ 413(f), 110 Stat. 1269 ..... 4, 31, 32, 3a
§ 413(g), 110 Stat. 1269-1270 ..... 4, 32, 4a
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ..... 4, 5, 30
Div. C:
Tit. III-A, 110 Stat. 3009-575:
§ 305, 110 Stat. 3009-597 ..... 4, 5a
§ 309(a), 110 Stat. 3009-625 ..... 4, 6a
§ 309(c), 110 Stat. 3009-625 ..... 4, 6a
Tit. VI-A, 110 Stat. 3009-689:
§ 604, 110 Stat. 3009-690 ..... 5, 9a
§ 604(c), 110 Stat. 3009-694 ..... 5, 11a

Statutes and regulations—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2, 5, 15, 16, 19, 30, 35
§ 101(a)(42), 8 U.S.C. 1101(a)(42)(A) 4, 5
§ 101(a)(43), 8 U.S.C. 1101(a)(43) 43, 12a
§ 101(a)(43)(B), 8 U.S.C. 1101(a)(43)(B) 34, 12a
§ 101(a)(43)(C), 8 U.S.C. 1101(a)(43)(C) 34, 12a
§ 101(a)(43)(D), 8 U.S.C. 1101(a)(43)(D) 34, 12a
§ 101(a)(43)(G), 8 U.S.C. 1101(a)(43)(G) 34, 12a
§ 104(a), 8 U.S.C. 1103(a) (1994 & Supp. II 1996) 19, 20, 28
§ 106a(a)(4), 8 U.S.C. 1105a(a)(4) 42
§ 208(a), 8 U.S.C. 1158(a) 4, 5, 7a, 8a
§ 208(b), 8 U.S.C. 1158(b)(1) (Supp. II 1996) 5, 9a
§ 208(b)(2), 8 U.S.C. 1158(b)(2) (Supp. II 1996) 5, 9a
§ 208(b)(2)(A)(iii), 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996) 5, 30, 9a
§ 209, 8 U.S.C. 1159 5
§ 212(a)(3)(B)(ii), 8 U.S.C. 1182(a)(3)(B)(ii) 11
§ 241, 8 U.S.C. 1231(b)(3) (Supp. II 1996) 4, 5a
§ 241(a)(1)(B), 8 U.S.C. 1251(a)(1)(B) 9
§ 243, 8 U.S.C. 1253 4
§ 243(h), 8 U.S.C. 1253(h) (1994) 4, 17, 24, 26, 29, 30, 31, 1a, 3a, 5a
§ 243(h)(1), 8 U.S.C. 1253(h)(1) (1994) 2, 7, 24, 1a, 3a
§ 243(h)(2), 8 U.S.C. 1253(h)(2) 3, 7, 16, 20, 31, 34, 1a, 3a
§ 243(h)(2)(A), 8 U.S.C. 1253(h)(2)(A) 25, 1a, 3a
§ 243(h)(2)(B), 8 U.S.C. 1253(h)(2)(B) 25, 32, 34, 43, 1a, 3a
§ 243(h)(2)(C), 8 U.S.C. 1253(h)(2)(C) ..... *passim*
§ 243(h)(2)(D), 8 U.S.C. 1253(h)(2)(D) 11, 25, 2a, 3a
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ..... 2, 5, 31, 38
18 U.S.C. 16 43
18 U.S.C. 33 43
18 U.S.C. 81 43
18 U.S.C. 113 43
8 C.F.R. (1998):
Section 2.1 20

Regulations—Continued: Page

Section 3.1 20
Section 208.16(b) 2
Section 208.16(b) (1995) 2
Section 208.16(c)(2) 4, 42
Section 208.16(c)(3) 32
Section 208.16(c)(3) (1995) 4, 42

Miscellaneous:

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H.R. 2816, 96th Cong., 1st Sess. (1979) 31
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New Assault Charges Filed Against 3 in Riot, N.Y. Times, May 29, 1992 44
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S. 643, 96th Cong., 1st Sess. (1979) 31
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Serrano out, de Leon Carpio in, Latin American Weekly Report, June 17, 1993 40
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 121 F.3d 521. The opinions of the Board of Immigration Appeals (Pet. App. 12a-18a) and the immigration judge (Pet. App. 19a-32a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 8, 1997. A timely petition for rehearing was denied on November 26, 1997. Pet. App. 33a. On February 17, 1998, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 26, 1998, and, on March 17, 1998, she further extended the time for filing to and including April 25, 1998 (a Saturday). The petition for a writ of certiorari was filed on April 27, 1998. Certiorari was granted on October 5,

1998. 119 S. Ct. 39. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND TREATIES INVOLVED

The relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, that were in effect when this case arose, as well as subsequent amendments to those provisions, appear in the appendix to this brief. That appendix also includes the texts of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, and the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259.

STATEMENT

1. a. The Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to provide two statutory avenues of potential relief for aliens who are unlawfully present within or attempting to enter the United States and who face a risk of persecution upon return to their native countries.

First, "if the Attorney General determines" that the alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (1998) (applicant bears the burden of proof of eligibility for withholding); 8 C.F.R. 208.16(b) (1995) (same; in effect at time of respondent's hearing).

Withholding of deportation protects the alien only against deportation to the country where the persecution risk exists; it does not entitle the alien to remain in the United States or avoid deportation to a third country. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987) (withholding is "country specific").

If the alien makes the requisite showing of persecution risk, withholding of deportation is mandatory. That provision for mandatory relief "shall not apply," however, if "the Attorney General determines that" the alien is covered by one of four statutory exceptions. Thus, paragraph (2) of Section 1253(h) provides:

> Paragraph (1) [mandatory withholding] shall not apply to any alien if the Attorney General determines that—
>
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
>
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
>
> (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

8 U.S.C. 1253(h)(2). If the evidence indicates that one of those four exceptions may apply, the alien bears the burden of proving by a preponderance of the evidence that the disqualifying event did not occur and that he remains eligible for withholding of deportation. 8 C.F.R. 208.16(c)(2) (1998); 8 C.F.R. 208.16(c)(3) (1995).[1]

Second, if the "Attorney General determines," 8 U.S.C. 1158(a), that an alien is a "refugee"—*i.e.*, "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III-A, § 305, 110 Stat. 3009-597, substantially revised and rewrote 8 U.S.C. 1253. The withholding provisions are now codified at 8 U.S.C. 1231(b)(3) (Supp. II 1996). IIRIRA does not govern the present case because its provisions apply only to withholding applications of aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III-A, § 309(a) and (c), 110 Stat. 3009-625.

Prior to the passage of IIRIRA, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269, also amended Section 1253(h) by adding a new paragraph (3). See note 13, *infra*. That amendment also does not govern the present case. It took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1269-1270. The Board of Immigration Appeals rendered its decision in this case, and thus took "final action" on respondent's application, on March 5, 1996 (Pet. App. 12a), before AEDPA's enactment date. Paragraph (3) was not carried forward in the revision of the withholding of deportation provisions made by IIRIRA.

In this brief, unless otherwise indicated, we shall refer to the withholding of deportation provisions as they were set forth in former 8 U.S.C. 1253(h) (1994) at the time respondent's application was filed and the Attorney General's decision was rendered.

particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A)—the Attorney General may, in her discretion, grant the alien asylum in the United States, 8 U.S.C. 1158(a). A person granted asylum is permitted to remain in the United States and may apply to adjust his status to lawful permanent resident after one year. 8 U.S.C. 1159; see also *Cardoza-Fonseca*, 480 U.S. at 428 n.6.

An alien seeking asylum need not prove a "clear probability of persecution," as he must to be eligible for withholding of deportation. He need only demonstrate a reasonable fear or risk of persecution. See *Cardoza-Fonseca*, 480 U.S. at 430-441. While withholding of deportation is mandatory, a grant of asylum falls within "the discretion of the Attorney General," 8 U.S.C. 1158(a), although the INA now renders certain categories of aliens ineligible for asylum.[2]

b. Congress enacted the Refugee Act, in large part, to harmonize United States law with the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, to which the United States

[2] Section 604 of IIRIRA, 110 Stat. 3009-690, significantly revised the INA's asylum provision. IIRIRA leaves the granting of asylum to the discretion of the Attorney General. 8 U.S.C. 1158(b)(1) (Supp. II 1996) ("[t]he Attorney General may grant asylum to an alien * * * if the Attorney General determines that such alien is a refugee"). But it now prohibits the Attorney General from granting asylum to six categories of aliens. 8 U.S.C. 1158(b)(2) (Supp. II 1996). One of those categories includes any alien "if the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). That amendment does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA, Div. C, Tit. VI-A, § 604(c), 110 Stat. 3009-694.

acceded in 1968, 19 U.S.T. 6223-6258. See *Stevic*, 467 U.S. at 416; *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 & n.19 (1993). The Protocol, in turn, binds its signatories to comply with Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (to which the United States is not a signatory), and generally adopts the Convention's definition of "refugee," for purposes of identifying who is entitled to the protection of its provisions. Protocol art. I(1) and (2), 19 U.S.T. at 6225; Convention art. I(A)(2), 19 U.S.T. at 6261. The Protocol does not contain any provisions governing the treatment of refugees independent of those incorporated from the Convention. 19 U.S.T. at 6225-6229.[3]

The Convention states, however, that its provisions "shall not apply" to:

> any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purpose and principles of the United Nations.

[3] For a discussion of the history and context underlying the United States' accession to the Protocol, see *Ming* v. *Marks*, 367 F. Supp. 673, 676-679 (S.D.N.Y. 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975).

Convention art. I(F)(a)-(c), 19 U.S.T. at 6263-6264. Those limitations are, in turn, incorporated into the Protocol. See art. I(2), 19 U.S.T. at 6225.

The withholding of deportation provision of the INA, 8 U.S.C. 1253(h)(1), implements Article 33 of the Convention (as incorporated by the Protocol). Article 33 provides:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

19 U.S.T. at 6276.

The disqualifications from withholding relief codified at 8 U.S.C. 1253(h)(2) parallel the limitations contained in Articles I(F) and 33(2) of the Convention on an alien's eligibility for withholding ("*nonrefoulement*"). See Convention arts. I(F), 33(2), 19 U.S.T. 6261, 6276. Neither the Convention nor the Protocol purports to regulate the terms under which signatory nations may grant or deny asylum. See G. S. Goodwin-Gill, *The Refugee in International Law* 103-105, 107, 119, 121, 225 (1983).

2. Respondent is a native and citizen of Guatemala. Pet. App. 13a. Respondent claims that, from 1989 to

1992, he was a member and leader of the student group Estudeante Syndicado. *Ibid.* Respondent was also active with a political party known as the National Central Union (UCN). *Id.* at 15a. During that time period, the UCN held the largest number of seats in the Guatemalan Congress, and one of the party's leaders was president of the Congress. Administrative Record (AR) 157-158 (the UCN "is legislatively the country's most powerful party").[4] According to the materials respondent submitted in conjunction with his application for asylum and withholding of deportation, the National Central Union "poses as a centrist party but leans decidedly to the right." AR 157.

Respondent estimates that, from 1989 to 1992, he personally participated in at least ten burnings of buses to protest increases in bus fares and the Guatemalan government's seeming inaction in investigating the deaths of student leaders. Pet. App. 13a. Wearing masks to hide their identities, respondent and his cohorts stopped the buses, and then would stone, hit with sticks, or tie with ropes and forcibly remove any passengers who did not leave the bus at their command. *Id.* at 13a, 22a. The buses, which were apparently privately owned, were then doused with gasoline and set on fire. J.A. 47.

Respondent also admitted that his activities as a member of the Estudeante Syndicado extended to vandalizing privately owned shops, forcibly evacuating the stores by beating the customers, breaking the windows, and destroying merchandise. Pet. App. 13a, 17a, 22a.

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[4] A copy of the administrative record in this case was lodged with the Court in conjunction with the filing of our reply brief at the petition stage.

3. In January 1993, respondent entered the United States without inspection. Pet. App. 20a. The Immigration and Naturalization Service (INS) subsequently charged respondent with deportability for illegal entry, 8 U.S.C. 1251(a)(1)(B). Pet. App. 20a. In November 1994, respondent appeared before an immigration judge and, through counsel, conceded that he was deportable. *Ibid.* He applied for asylum and withholding of deportation, claiming that "my political activities and involvement in political groups, including the U.C.N. political party made me fear that I would be persecuted for my political activities and involvement if I returned to Guatemala." AR 128.

The State Department's report on Guatemala, which the immigration judge solicited in conjunction with respondent's deportation proceedings (AR 107), advised that freely elected civilian governments have been in power in Guatemala since 1986 and that peaceful transfers of power between parties have been effected without violence. AR 116. The report noted that "common [criminal] violence has exploded in recent years," *ibid.*, that the "polarized and conflictive atmosphere in Guatemala makes it exceptionally difficult to differentiate political abuses from criminal violations," and that "[r]outinely, criminal acts are painted * * * as political, often without substantiated evidence," AR 111. The report also explained that, while some students have been threatened, harmed, and killed, "students and student leaders are not considered enemies by the government." AR 114. The report concluded that "[m]ost migration from Guatemala seems to be driven by economic hardship coupled with anxiety about criminal and political violence." AR 116.

Respondent testified before the immigration judge, through a translator, that he had received threats

based on his activities as a member both of the Estudeante Syndicado and the UCN. Pet. App. 23a. He claimed that the threats came from right-wing extremist groups, left-wing guerrillas, and the government. *Ibid.* He also feared punishment by the guerrillas for his participation in the military reserves. *Id.* at 26a.[5] None of the evidence and reports submitted by the State Department or respondent corroborated the existence of the Estudeante Syndicado or listed it or the UCN as a target of oppression by the Guatemalan government, right-wing groups, or leftist guerrillas. See AR 108-118, 134-179A.

After a hearing, an immigration judge granted respondent's applications for asylum and withholding of deportation. Pet. App. 32a. The immigration judge ruled that petitioner qualified as a refugee eligible for withholding of deportation and asylum because he faced the requisite threat and well-founded fear of reprisal for his political activities. *Id.* at 28a-32a. The immigration judge rejected the INS's contention that respondent had engaged in criminal activities that barred him from eligibility for withholding of deportation. *Id.* at 30a-31a. The immigration judge then found respondent statutorily eligible for withholding and, in addition, granted him asylum as a matter of discretion. *Id.* at 31a-32a.

4. The Board of Immigration Appeals (Board) sustained the INS's appeal and ordered respondent deported to Guatemala. Pet. App. 12a-18a.[6] The Board held that respondent was ineligible for withholding of

[5] Military service is universal in Guatemala. AR 115.

[6] Respondent never filed a brief with the Board, although he was represented by counsel and his request for an extension of time to file a brief was granted. AR 13-21.

deportation because he committed a "serious nonpolitical crime" prior to his entry into the United States and thus fell within a statutory prohibition on withholding, 8 U.S.C. 1253(h)(2)(C). The Board explained that, in applying the "serious nonpolitical crime" exception to eligibility for withholding of deportation, the Board "consider[ed] it important that the political aspect of the offense outweigh its common-law character," and observed that a crime would not be political if it "is grossly out of proportion to the political objective." Pet. App. 17a.

Evaluating the circumstances of this case, the Board found that respondent's actions in Guatemala "were serious enough to affect the lives of innocent bus passengers, shop owners and their customers," and that respondent's activities with the Estudeante Syndicado "added to the violent atmosphere in Guatemala by burning buses, destroying shops, and stoning, binding, and beating civilians unwilling to cooperate." Pet. App. 17a. The Board concluded that "the criminal nature of [respondent's] acts outweigh their political nature," reasoning that although respondent and the Syndicado "had a political agenda"—opposition to increased bus fares and seeming inaction in the investigation of student deaths—"[t]he ire of the [Syndicado] manifested itself disproportionately in the destruction of property and assaults on civilians." *Id.* at 18a.[7]

The Board also denied respondent asylum, explaining that "the nature of [respondent's] acts against innocent

[7] The Board rejected the INS's argument that respondent's criminal actions in Guatemala constituted terrorist acts, 8 U.S.C. 1182(a)(3)(B)(ii), and that he therefore is a danger to the security of the United States, which constitutes a separate bar to withholding of deportation under Section 1253(h)(2)(D). Pet. App. 17a.

Guatemalans lead us to find that he is unworthy of a favorable exercise of discretion for a grant of asylum." Pet. App. 17a.[8]

5. a. A divided panel of the court of appeals reversed and remanded to the Board. Pet. App. 1a-11a. Reviewing *de novo* the Board's interpretation and application of the statutory provisions governing eligibility for withholding of deportation, *id.* at 3a, the majority held that the Board committed three legal errors in finding respondent to be statutorily barred from withholding of deportation. *Id.* at 4a-7a.

First, the majority held that the Board erred in failing to "consider[] the political necessity and success of [respondent's] methods, weighing their political character against their criminal content." Pet. App. 5a-6a. Characterizing respondent's acts of burning buses, vandalizing private property, and beating civilians with stones and sticks as "crimes against property" and "minor assaults and batteries," *id.* at 4a, the majority observed that "forceful measures" may be necessary to draw a government's attention to a protest when the government "is an accomplice or an accessory to terroristic methods of government," *id.* at 5a.

Second, the majority held that the Board erred in failing to consider whether respondent's crimes involved "acts of atrocious nature," like the "indiscriminate bombing campaigns, . . . murder, torture,

[8] Having determined that respondent was barred from withholding of deportation because of his serious nonpolitical crimes in Guatemala and that those same actions warranted a denial of asylum in the exercise of discretion, the Board found it unnecessary to address the question of respondent's threshold eligibility for either form of relief—that is, whether he had established a clear probability or well-founded fear of persecution if returned to Guatemala. Pet. App. 17a-18a.

and maiming of innocent civilians" at issue in the Ninth Circuit's own prior decision in *McMullen* v. *INS*, 788 F.2d 591, 597 (1986). Pet. App. 6a. The court found it significant that respondent's acts here "fall far short" of those atrocities. *Ibid.*

Third, the majority held that the Board "erred as a matter of law" in failing to consider the severity of the persecution that respondent might face if he is returned to Guatemala. Pet. App. 6a. Quoting the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 156 (Jan. 1988), the court reasoned that "[i]f a person has well-founded fear of very severe persecution, * * * a crime must be very grave in order to exclude him." Pet. App. 6a.

Because the court concluded that the Board had committed "errors of law" in its analysis of respondent's eligibility for withholding of deportation, the court also remanded for the Board to reconsider whether respondent should be granted asylum. Pet. App. 7a.

b. Judge Kleinfeld dissented. Pet. App. 7a-11a. He explained that a crime need not be atrocious to bar withholding; rather, in his view, the mandatory bar is triggered as long as the crime is "disproportionate to the objective." *Id.* at 7a-8a (quoting *McMullen*, 788 F.2d at 595). Here, Judge Kleinfeld reasoned, the Board could appropriately conclude, based on respondent's own testimony, that his crimes were disproportionate to his political objectives. *Id.* at 10a. Respondent's acts of stoning and beating civilians, Judge Kleinfeld stressed, "were neither peaceful nor directed at the government" but rather "were violent, and directed at uninvolved people." *Id.* at 8a. Disagreeing with the

majority's characterization of the nature of respondent's violence, Judge Kleinfeld explained:

> Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed. Nor is it evident to me why burning buses and trashing stores is proportional to a protest largely directed at bus fares. (When he testified, [respondent] sometimes forgot to mention that his group was also upset about disappearances.)

Id. at 10a-11a. Judge Kleinfeld then concluded: "The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs." *Id.* at 11a.

SUMMARY OF ARGUMENT

In 8 U.S.C. 1253(h)(2)(C), Congress expressly vested in the Attorney General (and her delegates) the authority to determine whether an alien is barred from obtaining withholding of deportation because there are serious reasons for considering that the alien committed a "serious nonpolitical crime" prior to his arrival in the United States. Congress further made clear that, once the Attorney General has determined that there are "serious reasons for considering" that the alien has committed such a crime, the statutory bar is mandatory. In contravention of those clear delegations of

authority, the court of appeals' decision in this case substantially intruded upon the authority and judgment of the Attorney General to administer the INA and to undertake the context-specific and often sensitive determination of whether an alien who engaged in criminal conduct abroad should be granted safe haven in this country. As a result, the court of appeals' ruling inappropriately expands the availability of special humanitarian relief to persons engaged in violent conduct directed at innocent civilians. Accordingly, the judgment of the court of appeals should be reversed.

A. As an initial matter, the court of appeals erred in reviewing the Board's interpretation of Section 1253(h)(2)(C) de novo. This Court has repeatedly admonished that courts should accord the Attorney General and her designate, the Board of Immigration Appeals, substantial deference in construing the terms of the INA. Those principles of deference apply with particular force here, where Congress has expressly hinged an alien's disqualification from withholding on whether the "Attorney General determines" that there are "serious reasons for considering" that the alien committed a serious nonpolitical crime. That standard fairly exudes deference to the Executive Branch; the court of appeals utterly disregarded that delegation.

B. The Board has reasonably concluded that the severity of persecution an alien might face should not influence the determination of whether a serious nonpolitical crime was committed. That factor finds no home in the text of the INA, its legislative history, or the United Nations Convention Relating to the Status of Refugees. The risk of persecution has no bearing on whether a crime was serious or nonpolitical; rather, the court of appeals offered it as a reason to forgive the offense and allow withholding. So understood, the risk-

of-persecution test fashioned by the court of appeals is simply a vehicle for circumventing on policy grounds Congress's mandate that a serious nonpolitical crime disqualifies an alien from eligibility for withholding of deportation.

Consideration of the severity of persecution that an alien faces, moreover, would inject a balancing judgment into Section 1253(h)(2)(C) that is absent in parallel provisions of Section 1253(h)(2). It also presumes, without any basis, that Congress intended the risk of persecution to count twice in the withholding analysis —first, to determine the alien's initial eligibility, then once again to excuse a disqualifying event.

The court of appeals' reliance on the UNHCR *Handbook* was misplaced. As this Court has previously recognized, the UNHCR *Handbook* does not have the force of law and is not binding on the Attorney General. That principle is especially true here because the statutory provision at issue expressly turns upon what the "Attorney General determines"—not what the United Nations High Commissioner for Refugees believes—is a serious nonpolitical crime. Moreover, because the UNHCR *Handbook* is a non-contemporaneous and foreign source—and because it does not purport to interpret the Immigration and Nationality Act enacted by the Congress of the United States—there is no basis for believing that Congress meant for the UNHCR *Handbook* to trump the Attorney General's construction of the INA. That is particularly so where, as here, the Attorney General's interpretation is more consistent with the statutory text and structure. In any event, Congress, in enacting Section 1253(h)(2)(C), already struck a balance between the factors that the UNHCR *Handbook* identifies. There is no ground for a

court to require the Attorney General to strike that balance again on a case-by-case basis.

C. The court of appeals' holding that criminal activity must approach the level of "atrocious" before it will qualify as a serious nonpolitical crime is without merit. The plain meaning of the language Congress enacted refutes such a narrow view, and it is irreconcilable with other provisions of Section 1253(h). That standard, moreover, artificially truncates the Attorney General's ability to permit other important objectives—such as the protection of innocent civilians from violence—to inform the "serious nonpolitical crime" analysis.

D. The court of appeals also erred in insisting that, when determining whether criminal activity is serious and nonpolitical, the Attorney General must give weight to the perceived necessity and success of criminal activity against innocent civilians in attracting governmental attention. Nothing in the text of Section 1253(h)(2)(C), its legislative history, or international law compels the Attorney General to consider those factors. Furthermore, the necessity and success standard may do little to distinguish between political and nonpolitical crimes, and it is likely to reward (and thereby incite) violent, attention-grabbing conduct aimed at civilians. A requirement that the Attorney General must give weight to the perceived need for such conduct in a particular country thus could implicate sensitive foreign policy considerations.

E. Finally, the record in this case amply supports the Board's conclusion that there are serious reasons for considering that respondent committed a serious nonpolitical crime in Guatemala. His admitted and repeated acts of arson (burning buses), stoning and beating of innocent passengers, and destruction of store property qualify as serious crimes. The Board also

reasonably concluded that the targeting of innocent civilians rendered respondent's means disproportionate to his asserted political ends of lowering bus fares and encouraging the government to investigate student disappearances.

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS CORRECTLY INTERPRETED AND APPLIED THE "SERIOUS NONPOLITICAL CRIME" EXCEPTION, 8 U.S.C. 1253(h)(2)(C), TO DENY RESPONDENT WITHHOLDING OF DEPORTATION

Section 1253(h)(2)(C) of Title 8 of the United States Code states that the provision for withholding of deportation "shall not apply" to an alien if the "Attorney General determines" that "there are serious reasons for considering" that the alien "has committed a serious nonpolitical crime" prior to arrival in the United States. To determine whether a particular action constitutes a "serious nonpolitical crime," the Board of Immigration Appeals analyzes whether the "political aspect of the offense outweigh[s] its common-law character." *In re McMullen*, 19 I. & N. Dec. 90, 98 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986). Crimes that are "grossly out of proportion to the political objective" or "of an atrocious nature" constitute serious nonpolitical crimes. *Ibid.*; see also Pet. App. 17a (BIA applying test to this case).

Neither respondent nor the court of appeals contended that it was impermissible or unreasonable for the Board, in interpreting and applying Section 1253(h)(2)(C), to balance the common-law criminal character of the offense against its political aspects. The court of appeals concluded, however, that the Board was required to include additional factors in the balance: (i) the persecution that respondent might face

if returned to Guatemala, (ii) the lack of "atrocious" conduct, and (iii) the perceived necessity or success of respondent's criminal activity against innocent civilians and private property in achieving his asserted political objectives. None of those criteria appears in Section 1253(h)(2)(C). The court of appeals therefore erred in holding that the Attorney General is required to give them weight. The court of appeals should have instead deferred to the Attorney General's interpretation and application of the Act that she is charged by Congress with administering.

A. The Attorney General's Interpretation Of The Serious Nonpolitical Crime Exception Merits Substantial Deference

The Attorney General's construction of the "serious nonpolitical crime" exception is entitled to substantial deference. As this Court has long recognized, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). That is especially so with respect to the Attorney General's interpretation of the Immigration and Nationality Act (INA), because the INA specifically provides that, in administering the Act, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a).

Whether particular conduct is "nonpolitical" or rises to the level of a "serious crime" is not self-evident. Like the phrase "well-founded fear" that was at issue in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), "[t]here is obviously some ambiguity in a [phrase] like" serious nonpolitical crime, and that phrase "can only be given concrete meaning through a process of case-by-case

adjudication * * * [in which] the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *Id.* at 448. Nor is the scope of the "serious nonpolitical crime" exception a matter to which Congress has directly spoken. To the contrary, in Section 1253(h)(2), Congress expressly left it to the Attorney General (and her delegate, the Board of Immigration Appeals, 8 U.S.C. 1103(a) (1994 & Supp. II 1996); 8 C.F.R. 2.1, 3.1 (1998)) to "determine[]" the nature of the alien's conduct. Accordingly, the Board's conclusion that the existence of a "serious nonpolitical crime" does not turn upon the atrociousness of the conduct, the risk of persecution, or the necessity and success of the criminal conduct, must be upheld if reasonable. *Chevron*, 467 U.S. at 845.

That principle of deference applies with particular force here for two reasons. First, the Board was not simply construing ambiguous statutory language. It was interpreting a statutory standard that expressly leaves it to the "Attorney General [to] determine[]" if there are "serious reasons for considering" that a disqualifying crime occurred. That formulation—as opposed to one that looks to whether the alien in fact committed a crime and, if so, whether that crime, in fact, was serious and nonpolitical—emphasizes both that the determination is for the Attorney General to make and that her assessment and characterization of the conduct (whether she finds "serious reasons for considering" it to be serious and nonpolitical) is critical.[9] The deference due an agency's interpretation is magnified when Congress directs that the agency's judgment

[9] The "serious reasons" standard is essentially one of probable cause. *McMullen* v. *INS*, 788 F.2d at 598 & n.2, 599.

alone should ultimately control. See *INS* v. *Wang*, 450 U.S. 139, 144-145 (1981) (per curiam); see also *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988); cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

Second, the traditional reasons for deference "apply with even greater force in the INS context," because the Attorney General and those acting on her behalf "must exercise especially sensitive political functions that implicate questions of foreign relations." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988); see also *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (internal quotation marks omitted).

That basis for judicial caution obtains here. The decision whether an alien who has engaged in criminal conduct abroad should nevertheless be granted safe haven in this country is a context-specific and often politically sensitive determination. As the Attorney General explained, in a case involving the deportation of an alleged member of the Irish Republican Army to Great Britain, "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is one in which political considerations will be involved." *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Opin. Off. Legal Counsel 1, 23 (1989) (quoting G. S. Goodwin-Gill, *The Refugee in International Law* 35 (1983)), rev'd on other grounds, *Doherty* v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992). The United Nations High Commissioner for Refugees likewise has recognized that the decision whether the exclusions from eligibility for return ("*nonrefoulement*") apply rests with the contracting State in whose

territory the alien seeks recognition of his refugee status. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 149 (Jan. 1988) (UNHCR *Handbook*).

In sum, "it is clear that the Court of Appeals misconceived the nature of its role." *Chevron*, 467 U.S. at 845. "In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review." *INS* v. *Rios-Pineda*, 471 U.S. 444, 452 (1985). The court's duty thus was not to "substitute its own construction" of Section 1253(h)(2)(C), *Chevron*, 467 U.S. at 844, but to determine if the Attorney General's approach "is not one that Congress would have sanctioned," *id.* at 845. Because the Attorney General's interpretation and application of the Act are reasonable and consistent with the statutory text, the legislative history, and the Protocol and Convention, they should have been upheld.

B. The Board of Immigration Appeals Reasonably Concluded That The Risk of Persecution Upon Return Is Not Relevant In Determining Whether The Alien Committed A Serious Nonpolitical Crime

The court of appeals ruled (Pet. App. 6a-7a) that, in deciding whether to grant withholding of deportation, the Attorney General must balance the seriousness of the alien's crime against the risk of persecution he would face upon return. Because that consideration finds no support in the text of Section 1253(h)(2)(C) and is inconsistent with how parallel provisions have been interpreted, it is entirely reasonable for the Attorney

General not to superimpose that form of balancing onto the statutory framework.[10]

1. Nothing in the text of Section 1253(h)(2)(C) requires the Attorney General to consider the risk of persecution an alien allegedly faces if deported to a particular country in determining whether there are serious grounds for considering that he committed a serious nonpolitical crime before he even arrived in the United States. The risk of future persecution does not alter the seriousness of past criminal conduct. Nor can a persecution risk retroactively transmogrify nonpolitical criminal behavior into a political offense. Indeed, the court of appeals did not suggest that the risk of persecution that respondent claims to face informed the analysis of whether his conduct was either "serious" or "nonpolitical." See Pet. App. 6a-7a. Rather, the court of appeals employed the risk of persecution essentially as an extra-statutory equitable ground for excusing respondent's serious nonpolitical crimes: The court observed that "[respondent] could well be found to be in danger of losing his life if returned to Guatemala and therefore should be excluded *for his crimes* only 'for the most serious reasons,'" and faulted the Board because it "did not attempt to balance *his admitted offenses* against the danger to him of death if returned to his native land." *Id.* at 7a (emphasis added).

Congress, however, did not choose to draft Section 1253(h)(2)(C) to allow the risk of persecution the alien might fear to overcome that alien's serious criminal

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[10] The Ninth Circuit's decision in this regard squarely conflicts with the Eleventh Circuit's decision in *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1488 n.10 (1985) (per curiam), cert. denied, 475 U.S. 1022 (1986).

record. To the contrary, Congress has mandated that aliens be denied withholding if they have committed serious nonpolitical crimes abroad. See *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) ("shall" denotes a mandatory intent). For that reason, the Board has specifically and reasonably rejected the very balancing approach the Ninth Circuit has imposed. See *In re Rodriguez-Coto*, 19 I. & N. Dec. 208, 209 (BIA 1985) ("[W]e reject any interpretation of the phrase * * * 'serious nonpolitical crime' * * * which would vary with the nature of evidence of persecution. We cannot find that the language and framework of section [1253(h)] support[] such an approach."). Congress has already struck the appropriate balance between the interests of the individual alien and the political, foreign policy, and domestic interests of the United States that are implicated by sheltering an alien with a criminal past. That is a balance that the court of appeals was not free to recalibrate. *Rodriguez-Coto*, 19 I. & N. Dec. at 209 (reweighing the persecution risk "would in effect transform a statutory exclusionary clause into a discretionary consideration").

2. Section 1253(h) already factors the risk of persecution into the analysis of an alien's withholding claim. To be eligible for withholding of deportation at all, an alien must demonstrate at the outset that he faces a clear probability that his life or freedom would be threatened based on race, religion, nationality, social group, or political opinion. 8 U.S.C. 1253(h)(1); see also *Rodriguez-Coto*, 19 I. & N. Dec. at 209-210 ("[I]t is presupposed that all persons barred from relief by the provisions of section [1253](h)(2) can demonstrate a clear probability that their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political

opinion."). The court of appeals identified nothing in the statutory text, legislative history, or purpose of the withholding provision that would justify counting the persecution factor twice—first in determining the alien's initial eligibility, and then in applying the exceptions to withholding relief. Indeed, logic suggests that, if Congress believed the risk of persecution could absolve the alien's prior criminal conduct, there would have been no reason to make the commission of a serious nonpolitical crime a mandatory exception to the provision for withholding of deportation in the first place.

3. Requiring that the risk of persecution be considered again in assessing the "serious nonpolitical" character of a crime would be inconsistent with how the parallel exceptions to withholding relief operate. The other exceptions—applicable to aliens who assisted in the persecution of others, 8 U.S.C. 1253(h)(2)(A); have been convicted of a "particularly serious crime," 8 U.S.C. 1253(h)(2)(B); or pose a danger to the security of the United States, 8 U.S.C. 1253(h)(2)(D)—do not entail any further balancing if the alien is found to fall within their terms. See *Arauz* v. *Rivkind*, 845 F.2d 271, 275 (11th Cir. 1988) (no balancing of other considerations under Section 1253(h)(2)(B)); *Ramirez-Ramos* v. *INS*, 814 F.2d 1394, 1397-1398 (9th Cir. 1987) (no balancing of seriousness of offense against severity of persecution under Section 1253(h)(2)(B)); see also *Doherty* v. *INS*, 908 F.2d 1108, 1128 (2d Cir. 1990) (Lumbard, J., concurring in part and dissenting in part) ("[I]t is mandatory for the Attorney General to *deny* withholding if *he* determines that the alien fails any of the tests in § [1253](h)(2)(A)-(D)."), rev'd on other grounds, 502 U.S. 314 (1992). It is unreasonable to assume, in the absence of any differential language in the statutory

text, that Congress intended subsection (C) to operate as a more discretionary prohibition on the withholding of deportation than its immediate predecessor and successor subsections.

4. Nothing in the legislative history supports the court of appeals' holding that the threat of persecution must be considered again in deciding whether a crime is serious and nonpolitical, and therefore renders the alien ineligible for withholding of deportation. In fact, the legislative history of Section 1253(h) sheds little light specifically on the serious nonpolitical crime exception. The most it suggests is a general intent on the part of Congress, in enacting Section 1253(h) as a whole, to conform United States' law to the Protocol (and thus the terms of the Convention that the Protocol incorporates). See S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) (the withholding provision and its four exceptions are enacted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol"); H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) ("The Committee Amendment conforms United States statutory law to our obligations under Article 33 [of the Convention]."); S. Rep. No. 256, 96th Cong., 1st Sess. 4, 9 (1979).

Neither the Protocol nor the incorporated articles of the Convention, however, require that aliens who have committed serious nonpolitical crimes be afforded safe haven based on the severity of persecution they might face if deported to a particular country. To the contrary, the Protocol and Convention both exclude altogether from the Convention's protection "*any* person with respect to whom there are serious reasons for considering" that he "has committed a serious nonpolitical crime outside the country of refuge prior to his

admission to that country as a refugee." Protocol art. I(2), 19 U.S.T. at 6225 (incorporating Convention article I, 19 U.S.T. at 6261) (emphasis added); see also N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 67 (1953) ("Section F is couched in categorical language * * *. It follows that, once a determination is made that there are sufficient reasons to consider a certain person as coming under this section, the country making the determination is *barred* from according him the status of a refugee.") (emphasis added). The Protocol, moreover, is not a self-executing treaty. It thus does not confer any rights upon aliens beyond those granted by the implementing domestic legislation. *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991); *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982); see also *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1504 (11th Cir.) (withholding provision of Convention, Article 33, as incorporated into the Protocol, is not self-executing), cert. denied, 502 U.S. 1122 (1992).

The court of appeals relied (Pet. App. 6a-7a) on the UNHCR *Handbook*, *supra*, for the proposition that the severity of persecution must be weighed against the seriousness of the nonpolitical crime. *Id.* ¶ 156 ("[I]t is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him."). The court of appeals erred in permitting that *Handbook* provision to trump the Attorney General's interpretation of Section 1253(h)(2)(C).

First, the UNHCR *Handbook* does not have "the force of law or in any way bind[] the INS." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. "Indeed, the [UNHCR] *Handbook* itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (quoting UNHCR *Handbook* Foreword (II)). Moreover, while Congress intended to harmonize United States immigration law with the Protocol as a general matter, Congress gave absolutely no indication that it intended to bind itself (or the Attorney General) to the construction of that document by the United Nations High Commissioner for Refugees. Indeed, because the UNHCR *Handbook* postdates the United States' accession to the Protocol by more than a decade, neither Congress nor the President can be presumed to have accepted its interpretation of the Protocol's terms at the time the United States became a signatory.

Second, while the UNHCR *Handbook* may sometimes "provide[] significant guidance in construing the Protocol," *Cardoza-Fonseca*, 480 U.S. at 439 n.22, there is no basis for giving the United Nations High Commissioner more deference than Congress's designee, the Attorney General, in interpreting an Act of the Congress of the United States, especially where, as here, the Attorney General's interpretation comports with the Act's plain language and legislative history. See 8 U.S.C. 1103(a); *Haitian Ctrs. Council*, 509 U.S. at 171.[11]

[11] In *Cardoza-Fonseca*, by contrast, this Court found the UNHCR *Handbook* helpful when the Attorney General's interpretation was deemed to be inconsistent with the statutory text. See 480 U.S. at 431-432, 438-439. Compare *Haitian Ctrs. Council*, 509 U.S. at 183 n.40 (noting UNHCR *Handbook*'s implicit acknowledgment, consistent with the position of the United States, that Article 33 of the Convention, 19 U.S.T. at 6276, has no extraterritorial application).

Congress's intent to conform the United States' law to the Protocol cannot be equated with an intent to abdicate responsibility for the interpretation and enforcement of federal law to an agency of the United Nations. See also P. Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed* 333 (1995) (during negotiations on the Convention, it was noted that, because "the words [crimes or offences] had a general sense in all countries, each individual legal system would have to place its own interpretation on them.").

Third, in the text of Section 1253(h), Congress itself has already weighed the alien's risk of persecution against the character of his crimes. While the UNHCR *Handbook* anticipates ad hoc balancing in individual cases, Congress chose to strike the balance at a greater level of generality with respect to all aliens who have committed "serious nonpolitical crime[s]." In so doing, Congress, in effect, chose to give uniform weight to persecution risk in the implementation of Section 1253(h), rather than a weight that varies and that must be measured against the seriousness of particular past criminal conuct. The approach suggested by the UNHCR *Handbook*, by comparison, would ease the consequences for aliens facing "severe persecution," while providing that those who face "less serious" persecution would have their crimes scrutinized more harshly. See UNHCR *Handbook* ¶ 156. Thus, the balancing of the threat of future persecution against the severity of past conduct that the UNHCR *Handbook*

discusses took place in the United States at an earlier, legislative stage, and it is manifested in a manner that is structurally distinct from the model the UNHCR *Handbook* mentions. That departure, to the extent it is one, scarcely renders the approach chosen by Congress and the Attorney General improper.[12]

The legislative history confirms that Congress believed the text of Section 1253(h), as enacted, fully complied with the Protocol and its incorporated Convention terms, and that the Attorney General would not have to engage in further balancing or discretionary judgments to conform her administration of the INA to the United States' treaty obligations. When the competing drafts

[12] Because of the structure of the United States' immigration law, incorporation of the UNHCR *Handbook* approach here could have additional untoward consequences. As previously noted (see note 2, *supra*), Congress has recently revised federal asylum law. As amended by IIRIRA, the INA now prohibits the Attorney General from granting asylum to an alien if, *inter alia*, "the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). A ruling that the UNHCR *Handbook*'s approach governs the interpretation of "serious nonpolitical crime" in Section 1253(h)(2)(C) could now mean either that the same definition applies to IIRIRA's amendments to the INA's asylum provisions, even though it is undisputed that neither the Convention nor the Protocol purports to regulate asylum (UNHCR *Handbook*, Intro. (G) ¶¶ 24-25), or that Congress intended the term "serious nonpolitical crime" to have two different meanings within the same statute (see *Reno* v. *Koray*, 515 U.S. 50, 58 (1995) ("[T]he basic canon of statutory construction [is] that identical terms within an Act bear the same meaning.") (internal quotation marks omitted)). The better conclusion is simply that the UNHCR *Handbook* does not displace the Attorney General's interpretation of an Act of Congress.

of the Refugee Act of 1980 went before the Conference Committee, the bill passed by the House of Representatives contained the four exceptions to withholding of deportation that currently appear in 1253(h)(2), including the serious nonpolitical crime exception. See H.R. 2816, 96th Cong., 1st Sess. (1979), *reprinted in* H.R. Rep. No. 608, *supra*, at 47. The House Judiciary Committee believed that its four exceptions corresponded to those in the Convention. H.R. Rep. No. 608, *supra*, at 18 ("The exceptions are those provided in the Convention."). The Senate bill, by contrast, provided only that the Attorney General would not deport any alien facing persecution "unless deportation or return would be permitted under the terms of the United Nations Protocol Relating to the Status of Refugees." S. 643, 96th Cong., 1st Sess. § 203(e) (1979). The Senate bill thus would have left it to the Attorney General to discern what exceptions to withholding of deportation are called for under the Protocol (and therefore under the Convention) itself, giving whatever weight she deemed appropriate to the views of the UNHCR and conducting whatever balancing (if any) she believed was appropriate under the Convention.

In conference, the House of Representatives' version prevailed. S. Conf. Rep. No. 590, *supra*, at 20. Thus, after specific consideration of the alternative of incorporating the provisions of the Convention directly into United States law, Congress instead enacted a version of Section 1253(h) that struck, in mandatory legislative terms, what it considered to be the appropriate balance between the risk of persecution and the seriousness of a criminal offense.[13]

[13] In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269,

In sum, the court of appeals erred in mandating that the seriousness of respondent's crimes be discounted by the severity of the persecution he allegedly faces. That factor derives not from the text or legislative history of the governing Act of Congress, or even from the text of the Convention, but solely from a non-contemporaneous and non-binding document concerning implementation of the Convention authored by a source external to the United States Government.

Congress temporarily instituted a scheme under which the Attorney General had the authority independently to conform withholding provisions to the Protocol. Section 413(f) of that Act provided that the mandate for withholding of deportation shall apply to an alien, notwithstanding any other provision of law, "if the Attorney General determines, in the discretion of the Attorney General," that (A) such alien faces a clear probability of persecution in the country to which the alien would be deported, and (B) withholding of deportation "is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." 110 Stat. 1269. That amendment, however, does not govern the present case. It took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1269-1270. The Board of Immigration Appeals rendered its decision, and thus took "final action" on respondent's application, on March 5, 1996 (Pet. App. 12a). In any event, AEDPA gave the Attorney General discretion to conform the withholding prohibitions to the Protocol, not to the UNHCR *Handbook*. Furthermore, the legislative history of Section 413(f) indicates that it was designed not to alter the scope of the serious nonpolitical crime exception, but to afford the Attorney General discretion in assessing whether aggravated felonies constitute "particularly serious" crimes within the meaning of Section 1253(h)(2)(B). See *Choeum* v. *INS*, 129 F.3d 29, 42-43 (1st Cir. 1997); accord 8 C.F.R. 208.16(c)(3) (1998).

C. The Board Reasonably Concluded That Respondent's Offenses Constituted Serious Nonpolitical Crimes Even Though They Were Not "Atrocious" In Character

The Ninth Circuit further erred in requiring the Attorney General to consider whether respondent's criminal activities involved "acts of an atrocious nature," of the sort described in that court's *McMullen* opinion (Pet. App. 6a), before concluding that they were serious nonpolitical crimes. While the Attorney General certainly considers atrocious crimes to fall within Section 1253(h)(2)(C)'s exception to mandatory withholding of deportation, she has also concluded that an offense "should be considered a serious nonpolitical crime if the act is disproportionate to the objective." See *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Opin. Off. Legal Counsel at 23 (quoting *McMullen* v. *INS*, 788 F.2d at 595). The Board thus "consider[s] it important that the political aspect of the offense outweigh its common-law character." Pet. App. 17a. As a result, a crime will not, for example, be deemed political if it "is grossly out of proportion to the political objective." *Ibid.*

1. The Attorney General's interpretation of "serious nonpolitical crime" to include disproportionately criminal offenses, as well as atrocities, is consistent with the statute's language and structure. "Serious" generally signifies actions that "cause considerable distress, anxiety, or inconvenience." *Webster's Third New Int'l Dictionary* 2073 (1986); see also *Webster's II New Riverside Univ. Dictionary* 1065 (1994) ("[g]rave in quality, character or manner * * * [i]nvolving important rather than trivial matters"). "Atrocious," on the other hand, captures only a narrow subset of serious crimes, those that are "marked by or given to extreme wickedness * * * [or] extreme brutality or cruelty: grossly

inhumane." *Webster's Third New Int'l Dictionary*, *supra*, at 139; see also *Webster's II*, *supra*, at 135 ("[e]xtremely evil or cruel: monstrous"). By focusing on the relative level of criminality, violence, and disorder occasioned by an individual's criminal activity, and its proportionality to the claimed objective, the Attorney General's interpretation gives the phrase "serious nonpolitical crime" its full meaning. Thus, unlike the court of appeals, the Attorney General has reasonably recognized that "serious nonpolitical crime" embraces a spectrum of conduct, and not simply humanity's nadir.

2. The Attorney General's interpretation is also consistent with the structure of Section 1253(h)(2). See *Smith* v. *United States*, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."). Subsection (h)(2)(B) of Section 1253 separately precludes any alien who has been convicted of a "particularly serious crime" from obtaining mandatory withholding relief. The Section then instructs that "an aggravated felony shall be considered to" be a "particularly serious crime." 8 U.S.C. 1253(h)(2). "Aggravated felony" is broadly defined to include illicit trafficking in firearms, money laundering, and certain controlled substance and theft offenses. 8 U.S.C. 1101(a)(43)(B), (C), (D) and (G). Common sense dictates that Congress intended the phrase "particularly serious crime" in Subsection (h)(2)(B) to embrace criminal conduct of a more weighty and grave magnitude than the "serious" nonpolitical crimes addressed by Subsection (h)(2)(C). See generally *United States* v. *Granderson*, 511 U.S. 39, 42 (1994) (statute should be accorded "a sensible construction"). Otherwise the word "particularly" would have no independent significance. See generally *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[A] legislature is presumed to have used no superfluous words.")

(internal quotation marks omitted). Because Congress has directed that an aggravated felony satisfies the definition of "particularly serious crime," it surely is reasonable for the Attorney General to adopt a construction of "serious" crime that does not categorically require that same level of criminality, much less that the criminal activity be "atrocious" in nature. The court of appeals' focus on atrocity, by contrast, results in an upside-down statutory construct under which "serious" crimes must register as more depraved and violent than "particularly serious crimes."

3. In effectively equating "serious nonpolitical crime[s]" with atrocities, the court of appeals not only departed from the INA's plain text, but also artificially truncated the Attorney General's ability to factor other, significant judgments into the "serious nonpolitical crime" calculus. As relevant to this case, the Attorney General has determined that criminal violence targeted solely or primarily at innocent civilians will often be disproportionate to any reasonable political objective. See *Deportation Proceedings of Joseph Doherty*, 12 Opin. Off. Legal Counsel 1, 8 n.9 (1988) ("[I]t is the policy of the United States to condemn acts of violence directed against non-combatants even by those who are otherwise legitimately seeking to oppose a non-democratic government."); *Deportation Proceedings for Joseph Doherty*, 13 Opin. Off. Legal Counsel at 24; *McMullen*, 19 I. & N. Dec. at 98-99. "The distinction between acts against ordinary civilians and official instrumentalities has been extant in the common law since *In re Meunier*, 2 Q.B. 415 (1894)." *McMullen* v. *INS*, 788 F.2d at 597. Both this Court and the courts of appeals have recognized that violence against helpless civilians falls beyond the legitimate boundaries of political activity. See *Ornelas* v. *Ruiz*, 161 U.S. 502, 510-511

(1896) (where "private citizens were also violently assaulted; horses belonging to them taken; houses burned; small sums of money extorted from women; clothes, provisions, and goods appropriated; and three citizens kidnapped," the State Department reasonably concluded that the actions were not political for purposes of an exception to extradition); *McMullen* v. *INS*, 788 F.2d at 598 (refusing to deem "acts of violence directed at ordinary citizens" to be "political crimes" within the meaning of 8 U.S.C. 1253(h)(2)(C)); *Eain* v. *Wilkes*, 641 F.2d 504, 521-523 (7th Cir.) (bombing campaign directed at a civilian population cannot be considered a political offense for extradition purposes), cert. denied, 454 U.S. 894 (1981).

The Attorney General's judgment regarding the inherent gravity of violence against civilians, moreover, is consonant with general principles of international law, which clearly confirm that civilians should not be the intentional targets of attacks by government or anti-government forces. See, *e.g.*, Protocol I Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(2), 16 I.L.M. 1391, 1413 ("The civilian population as such, as well as individual civilians, shall not be the object of attack."); *id.* art. 48, 16 I.L.M. at 1412 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the [self-determination] conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."); Protocol II Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977,

arts. 4, 13, 16 I.L.M. 1442, 1444, 1447;[14] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, arts. 1, 4, 8, *reprinted in* 24 U.S.T. 565, 568, 569, 571; UNHCR *Handbook* ¶ 158 (suggesting that hijacking of aircraft and its crew, "under threat of arms or with actual violence," will be "difficult" to overlook under the serious nonpolitical crime exception).[15]

A further defect in the court of appeals' restrictive view of a "serious nonpolitical crime" is thus that it effectively bars the Attorney General from giving significant weight not only to the nature and severity of the crime, but also to the identity of the victim. Because case law dating from the 19th century and established international norms alike recognize that organized violence against innocent civilians is not protected political conduct, the Attorney General and the Board have reasonably construed Section 1253(h)(2)(C) in a manner that ensures that the special humanitarian relief of withholding of deportation does not reward the

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[14] Although both Protocols I and II have been signed by the United States, at this time only Protocol II has been transmitted to the Senate for its advice and consent to ratification by the President. See S. Treaty Doc. No. 2, 100th Cong., 1st Sess. iv (1987). The United States accepts the principle that civilians and civilian property per se may not be the intentional object of attack in armed conflict.

[15] See generally Geneva Convention Relative to the Protection of Civilian Persons in Time Of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* 6 U.S.T. 3516 (this Convention entered into force for the United States on Feb. 2, 1956); D. Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. Int'l L. & Econ. 483, 501 (1975) ("'[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent.'") (quoting study by the United Nations Secretariat).

perpetrators of such violence. See also Pet. App. 11a (Kleinfeld, J., dissenting) ("The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs.").

D. The Board Reasonably Concluded That Respondent's Offenses Were Serious Nonpolitical Crimes Based On Their Nature And Character, Not Their Perceived Necessity Or Success

In determining whether respondent's acts of arson, assault and battery, and vandalism constituted serious nonpolitical crimes, the Board focused on the nature and character of respondent's behavior and the correlation between respondent's conduct and his proclaimed political objectives. Pet. App. 18a. The court of appeals held (*id.* at 5a-6a) that, in addition, "[t]he Board should have considered the political necessity and success of [respondent's] methods." Injecting those new elements into the "serious nonpolitical crime" inquiry was error.

First, those factors make no appearance in the statutory text. They do not inhere in the ordinary meaning of the terms "serious" and "nonpolitical," which suggest no more than a requirement that there be an evaluation of the potential or actual damage wrought by the crime and its effect on the victims, and the crime's nexus to the achievement of a political end. Indeed, the court of appeals employed the concepts of necessity and success not to discern the character of respondent's crimes, but rather to excuse the violence after the fact. See Pet. App. 5a ("When you are dealing with an ass it may be necessary to move the beast by a blow on a sensitive part even though what you want to move are the feet.").

Second, the necessity and success factors make no appearance in the legislative history of the Refugee Act or in the text of the Protocol or Convention, or even in

the UNHCR *Handbook*. Nor did the court of appeals cite any other authority to support its ruling. See Pet. App. 5a-6a. The mere fact that the perceived necessity and success of violence directed at innocent civilians and private property might strike a reviewing court as germane does not warrant displacing the interpretation of "serious nonpolitical crime" adopted by the Attorney General under authority of Congress's express assignment of interpretative responsibility. See *Rios-Pineda*, 471 U.S. at 451 ("The Act commits the definition of the standards in the [Immigration and Nationality] Act to the Attorney General and [her] delegate in the first instance, and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.") (internal quotation marks omitted).

Third, strong policy reasons counsel against a rule compelling the Attorney General to give weight to the perceived necessity and success of violence in these circumstances. In the first place, an announcement by officials of the United States Government that criminal violence against civilians is "necessary" in a particular country could incite further violence and could have extremely sensitive foreign policy and diplomatic implications. The Attorney General may thus reasonably elect to forgo injecting such an element into the withholding analysis under United States law.[16]

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[16] Conversely, to require a showing of necessity could impair the ability of genuine political refugees to qualify for withholding. Where the character of the alien's conduct is not serious and yet unquestionably political (*e.g.*, trespass by sitting in at a segregated lunch counter; striking by farm laborers; engaging in prohibited religious exercise), it is reasonable for the Attorney General not to require the alien also to prove that no alternative means of protest

Further, the Board could reasonably conclude, based on established domestic and international norms, that violence aimed at unarmed and helpless civilians will presumptively constitute a serious and nonpolitical crime despite the alien's own perception that it was necessary. Such actions seek in the first place only general social disorder and misery; the change or downfall of the government is at best "intended only as an indirect result." *McMullen* v. *INS*, 788 F.2d at 597; see also *Eain*, 641 F.2d at 519 (terror tactics aimed at civilians "seek[] to promote social chaos"). It is well within the Attorney General's "considerable discretion," *Stevic*, 467 U.S. at 429 n.22, to conclude that violent crime targeting civilians is too tangential and remote a means of effecting political change to discount the otherwise serious and nonpolitical nature of an offense.[17]

(such as a march) were available and thus that the unlawful conduct was "necessary."

[17] Even if the Attorney General were to decide that necessity should be a relevant consideration, the court of appeals' conclusion that arson, beatings, and vandalism directed at civilians were necessary to effect governmental change during the relevant time in Guatemala misunderstands the record and reality. As the State Department reported to the immigration judge, Guatemala has enjoyed peaceful transfers of power between governments since 1986. AR 116. Furthermore, shortly after respondent left Guatemala, an attempt by the then Guatemalan President to suspend constitutional rule was quelled, and the President ousted, by purely peaceful protests. See *Serrano out, de Leon Carpio in*, Latin American Weekly Report, June 17, 1993, at 267; F. Villagran de Leon, *Thwarting the Guatemalan Coup*, 4 Journal of Democracy 117 (Oct. 1993). If peaceful resistance was a sufficiently potent protest vehicle to bring down a government, it is difficult to conceive why beating and stoning bus passengers were "necessary" simply to have bus fares lowered or crimes investigated.

"Success," which the court of appeals defined simply as "draw[ing] the government's attention to your protest; your political objective is a governmental response" (Pet. App. 5a), is also a problematic consideration. Attracting the attention of the government might often weigh strongly in favor of—not against—the conclusion that a crime was "serious." The government is rarely waylaid by petty infractions. See Pet. App. 18a (respondent's crimes were "*violent enough* to attract the attention of the main combatants in the Guatemalan conflict") (emphasis added). Success in attracting governmental attention, moreover, may do little to distinguish political from nonpolitical offenses. Narcoterrorists, street gangs, and serial killers all receive attention from and provoke reactions by the government. The government's response, however, cannot by itself retroactively invest the crime with a political content that was lacking at the time of commission. Finally, the court of appeals paid scant heed to the Attorney General's policy judgment that violence against innocent civilians, however successful in accomplishing its supposed political objectives, may militate strongly in favor of concluding that a serious nonpolitical crime has been committed.

E. Substantial Evidence Supported The Board's Determination That Respondent's Violence Constituted Serious Nonpolitical Crimes

Even as to those aspects of the Board's approach in this case with which it agreed, the court of appeals concluded that the Board erred in applying them to respondent's case. Pet. App. 4a-6a. The question whether there are "serious reasons for considering" that a particular offense qualifies as serious and nonpolitical, however, is largely factual. See *Ornelas*, 161 U.S. at 509 (whether a crime is a political offense is

chiefly a question of fact). The Board's resolution of those factual issues must be sustained by the court of appeals if supported by substantial evidence. 8 U.S.C. 1105a(a)(4) (factual findings made by the Board are to be reviewed for substantial evidence); see also *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481, 483-484 (1992). Once respondent admitted his criminal activities, moreover, the burden of proof fell on him to show that his offenses were not serious and were political in character. See 8 C.F.R. 208.16(c)(2) (1998); 8 C.F.R. 208.16(c)(3) (1995). Before a court of appeals may set aside a Board decision, the alien must show that the evidence he presented "was so compelling that no reasonable factfinder could fail to find" that he was eligible for relief. *Elias-Zacarias*, 502 U.S. at 483-484; see also *id.* at 481 n.1 ("To reverse the [Board's] finding we must find that the evidence not only *supports* [the contrary] conclusion, but *compels* it.").

Based on the record before the Board, there plainly was substantial evidence to support its determination that respondent's acts of arson, assault and battery, and vandalism against innocent civilians and their property constituted serious nonpolitical crimes. Respondent testified that, on numerous occasions, he would stone, beat with sticks, and bind innocent civilians if they did not abandon the buses promptly at his command. Pet. App. 8a-9a; J.A. 47-48. He also confessed to burning the buses and vandalizing and destroying the inventory of local shopkeepers. Pet. App. 9a-10a; J.A. 49. Respondent's own admissions unquestionably amount to substantial evidence of his crimes. Cf. *Motes* v. *United States*, 178 U.S. 458, 475-476 (1900) (testimonial admission to criminal conduct is sufficient by itself to sustain a guilty verdict).

Nor can it reasonably be disputed that respondent's repeated burning of buses (arson), beating with sticks and stoning of passengers (assault with dangerous weapons), and destruction of private property constitute "serious" crimes. They are, to the contrary, the very types of crimes that the Convention contemplated as "serious." *McMullen* v. *INS*, 788 F.2d at 597; P. Weis, *supra*, at 342 (arson); 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 294 (1966) (arson); *The Refugee in International Law*, *supra*, at 62 (arson). Indeed, "there are serious reasons for considering," 8 U.S.C. 1253(h)(2)(C), on the basis of the present record, that respondent's acts of arson and assault with a dangerous weapon would qualify as aggravated felonies. See 18 U.S.C. 16, 33, 81, 113; 8 U.S.C. 1101(a)(43). Congress intended for that very conduct, if the subject of a conviction, to constitute "particularly serious crime[s]" that would disqualify the perpetrator from withholding under 8 U.S.C. 1253(h)(2)(B). It should follow *a fortiori* that the crimes are "serious" within the meaning of Section 1253(h)(2)(C) as well.

The court of appeals (Pet. App. 4a) was unjustified in characterizing respondent's offenses as mere "crimes against property" and "minor assaults and batteries." As the dissent noted:

> Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The bus passengers, perhaps travelling to

> work or going home exhausted at the end of hard days, probably would not interrupt their journeys for a bunch of angry boys with little sticks.

Pet. App. 10a-11a. Nor is it reasonable to assume that "minor" assaults and petty property crimes would have, as respondent claims and the court of appeals found, attracted the attention of government officials and "earn[ed] the enmity of a rival rebel group, 'the guerrillas.'" *Id.* at 5a.[18] In any event, it was respondent's burden to prove that his assaults and arson were minor; his claims that his conduct inspired death threats and governmental and guerrilla attention undercut any such theory.

The record also amply supports the Board's determination that respondent's crimes were nonpolitical. Respondent's primary concern about increased bus fares could reasonably be regarded as more economic than political, notwithstanding the court of appeals' assertion that respondent had "no personal motivation or gain." Pet. App. 5a. Even assuming that his occasional references to student disappearances as the impetus for his conduct would be sufficient to invest his

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[18] Respondent's description of his activities of forcibly removing passengers from the bus and beating them with stones and sticks is reminiscent of the beating of truck driver Reginald Denny during the Los Angeles riots in May 1992—a brutal assault that no reasonable person could characterize as anything but "serious." See R. W. Stevenson, *Riots in Los Angeles: Moment of Terror; Blacks Beat White Truck Driver as TV Cameras Record the Scene*, New York Times, May 1, 1992, at A21 ("Mr. Denny * * * was yanked from the cab of his truck by a band of black men and beaten * * *. [S]everal men could be seen approaching him, throwing stones or bottles."); see also *New Assault Charges Filed Against 3 in Riot*, New York Times, May 29, 1992, at A13 (37 felony charges filed against perpetrators of Denny beating).

crimes with a political component, his crimes were disproportionate and bore only a remote nexus to his claimed political objectives. In the view of the Attorney General and the Board, the wanton victimization of defenseless civilians plays a vital role in determining whether a crime is disproportionate to the achievement of any legitimate political objective. Respondent's venting of his political anger on innocent and helpless civilians, moreover, would at most have accomplished general social unrest and disorder. Its capacity to motivate the government either to lower bus fares or to investigate student disappearances was remote, especially if, as respondent and the court of appeals believed (Pet. App. 5a), the Guatemalan government cared little for the well-being of its citizens. Why the buses had to be burned during the day when filled with civilians, rather than when empty at night or off duty, is left unexplained, unless terrorizing civilians was one of respondent's primary objectives. Nor is there any obvious logical, direct connection between beating civilians, burning what were apparently privately owned buses, and looting privately owned stores, on the one hand, and prompting governmental investigations of student disappearances on the other.

In short, because respondent's ire "manifested itself disproportionately in the destruction of [private] property and assaults on civilians," Pet. App. 18a, the Board reasonably concluded that there was not a sufficiently direct causal link between the criminal acts respondent inflicted on ordinary, uninvolved civilians and his opposition to the government and its official instrumentalities. Thus, the Board's conclusion that respondent is ineligible for withholding of deportation because there are "serious reasons for considering" that

he "committed a serious nonpolitical crime" in Guatemala should have been sustained.[19]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[19] In addition to reversing and remanding the Board's determination that respondent was ineligible for withholding of deportation, the court of appeals vacated and remanded the Board's discretionary denial of asylum on the ground that reconsideration of respondent's activities in light of the court's decision on the withholding of deportation issue could alter the Board's exercise of its discretion to deny asylum as well. Pet. App. 7a. If this Court reverses the court of appeals' holding on the withholding of deportation issue, the sole basis for the court of appeals' asylum ruling will necessarily be eliminated as well. Furthermore, this Court repeatedly has confirmed that the Attorney General may deny asylum purely on discretionary grounds, without reference to the alien's statutory eligibility for non-discretionary forms of relief. See *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); *Abudu*, 485 U.S. at 105.

APPENDIX

PROVISIONS GOVERNING WITHHOLDING OF DEPORTATION AND REMOVAL

8 U.S.C. 1253(h) (1994), which governs the present case, provided:

Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269, amended 8 U.S.C. 1253(h) to read (language added by the amendment is italicized):

Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious

crime. *For purposes of subparagraph (D), an alien who is described in section 241(a)(4)(B) of this title shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States.*

(3) Notwithstanding any other provision of law, paragraph (1) shall apply to any alien if the Attorney General determines, in the discretion of the Attorney General, that—

(A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.

* * * * *

[This amendment became effective on April 24, 1996 and "appl[ies] to applications filed before, on, or after such date if final action has not been taken on them before such date." See AEDPA, Tit. IV-B, § 413(g), 110 Stat. 1269-1270.]

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Tit. III-A, Div. C, § 305, 110 Stat. 3009-602 (Sept. 30, 1996), revised and rewrote 8 U.S.C. 1253(h) in its entirety. The provision relating to withholding of deportation is now codified, as amended, at 8 U.S.C. 1231(b)(3) (Supp. II 1996), and it provides, in relevant part:

(b) Countries to which aliens may be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened—

(A) In general.

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception.

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

* * * * *

[This amendment applies to aliens who were placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III-A, § 309(a) & (c), 110 Stat. 3009-625.]

PROVISIONS GOVERNING ASYLUM

8 U.S.C. 1158(a) (1994), which governs the present case, provided:

Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

AEDPA, Tit. IV-C, § 421(a), 110 Stat. 1270, amended 8 U.S.C. 1158 to read (language added by the amendment is italicized):

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. *The Attorney General may not grant an alien asylum if the Attorney General determines that the alien is excludable under subclause (I), (II), or (III) of section 212(a)(3)(B)(i) or deportable under section 241(a)(4)(B), unless the Attorney General determines, in the discretion of the Attorney General, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.*

* * * * *

[This amendment became effective on April 24, 1996, and applies to "asylum determinations made on or after such date." AEDPA, Tit. VI-C, § 421(b), 110 Stat. 1270.]

IIRIRA, Tit. VI-A, § 604, 110 Stat. 3009-691 to 3009-692, revised and rewrote 8 U.S.C. 1158 in its entirety. The provision relating to asylum is now codified, as amended, at 8 U.S.C. 1158(b) (Supp. II 1996), and it provides, in relevant part:

(b) Conditions for granting asylum

(1) In general.

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(2) Exceptions

(A) In general.

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules—

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

* * * * *

[This amendment applies to applications for asylum filed on or after April 1, 1997. See IIRIRA, Tit. VI-A, § 604(c), 110 Stat. 3009-694.]

8 U.S.C. 1101(a)(43) (1994) provides:

The term "aggravated felony" means—

(A) murder;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $100,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 5 years;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of

imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations) for which a sentence of 5 years' imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business; or

(ii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588,[1] of title 18 (relating to peonage, slavery, and involuntary servitude);

(L) an offense described in —

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18; or

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $200,000; or

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[1] So in original. The comma probably should not appear.

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000;

(N) an offense described in section 1324(a)(1)[2] of this title (relating to alien smuggling) for the purpose of commercial advantage;

(O) an offense described in section 1546(a) of title 18 (relating to document fraud) which constitutes trafficking in the documents described in such section for which the term of imprisonment imposed (regardless of any suspicion[3] of such imprisonment) is at least 5 years;

(P) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 15 years or more; and

(Q) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

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[2] See Codification note below.

[3] So in original. Probably should be "suspension".

MULTILATERAL

Protocol Relating to the Status of Refugees

Done at New York January 31, 1967;
Accession advised by the Senate of the United States of America, subject to certain reservations, October 4, 1968;
Accession approved by the President of the United States of America, subject to said reservations, October 15, 1968;
Accession of the United States of America deposited with the Secretary-General of the United Nations, with the said reservations, November 1, 1968;
Proclaimed by the President of the United States of America November 6, 1968;
Entered into force with respect to the United States of America November 1, 1968.
And text of Convention relating to the status of refugees Done at Geneva July 28, 1951.

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Protocol Relating to the Status of Refugees was opened for accession at New York on January 31, 1967, the certified text of which in the English, French, Chinese, Russian, and Spanish languages is word for word as follows:

[19 U.S.T. 6224 — 6258]

PROTOCOL RELATING

TO THE STATUS

OF REFUGEES

[Seal omitted]

UNITED NATIONS

1967

T I A S 6577

PROTOCOL RELATING TO THE STATUS OF REFUGEES

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article I

GENERAL PROVISION

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term refugee shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words

"As a result of events occurring before 1 January 1951 and..." and the words "... as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Article II

CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees;

(b) The implementation of the present Protocol;

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III

INFORMATION ON NATIONAL LEGISLATION

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV

SETTLEMENT OF DISPUTES

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article V

ACCESSION

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of

accession with the Secretary-General of the United Nations.

Article VI

FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of

the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII

RESERVATIONS AND DECLARATIONS

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declaration made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of

the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply mutatis mutandis to the present Protocol.

Article VIII

ENTRY INTO FORCE

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX

DENUNCIATION

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X

NOTIFICATIONS BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

Article XI

DEPOSIT IN THE ARCHIVES OF THE SECRETARIAT OF THE UNITED NATIONS

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

In accordance with article XI of the Protocol, we have appended our signatures this thirty-first day of January one thousand nine hundred and sixty-seven.

A.R. PAZHWAK	U THANT
PRESIDENT OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS	SECRETARY-GENERAL OF THE UNITED NATIONS

I hereby certify that the foregoing text is a true copy of the Protocol relating to the Status of Refugees, done at New York, on 31 January 1967, in a single copy signed by the President of the General Assembly of the United Nations and the Secretary-General of the United Nations, the original of which is deposited with the Secretary-General of the United Nations.

***For the Secretary-General*:**

C A STAVROPOULOS

Under-Secretary
Legal Counsel

United Nations, New York
9 February 1967

[foreign language versions omited]

WHEREAS the Senate of the United States of America by its resolution of October 4, 1968, two- thirds of the Senators present concurring therein, did advise and consent to accession to the Protocol with the following reservations:

> "The United States of America construes Article 29 of the Convention as applying only to refugees who are resident in the United States and reserves the right to tax refugees who are not residents of the United States in accordance with its general rules relating to nonresident aliens."
>
> "The United States of America accepts the obligation of paragraph 1(b) of Article 24 of the Convention except insofar as that paragraph may conflict in certain instances with any provision of title II (old age, survivors and disability insurance) or title XVIII (hospital and medical insurance for the aged) of the Social Security Act. As to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favorable than is accorded aliens generally in the same circumstances."

WHEREAS the President of the United States of America, in pursuance of the advice and consent of the Senate, duly approved on October 15, 1968 the accession of the United States of America to the Protocol with the aforesaid reservations;

WHEREAS it is provided in Article VIII that the Protocol shall come into force on the day of deposit of the sixth instrument of accession and shall come into

force for each State acceding thereafter on the date of deposit of its instrument of accession;

AND WHEREAS, pursuant to the provisions of Article VIII, the Protocol first came into force on October 4, 1967, and came into force with respect to the United States of America, subject to the aforesaid reservations, on November 1, 1968, the date of deposit by the United States of America of its instrument of accession;

NOW, THEREFORE, be it known that I, Lyndon B. Johnson, President of the United States of America, do hereby proclaim and make public the Protocol Relating to the Status of Refugees, to the end that the same and every article and clause thereof shall be observed and fulfilled with good faith, on and after November 1, 1968, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof, subject to the aforesaid reservations.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

[seal] DONE at the city of Washington this sixth day of November in the year of our Lord one thousand nine hundred sixty-eight and of the Independence of the United States of America the one hundred ninety-third.

LYNDON B. JOHNSON

By the President:
DEAN RUSK
Secretary of State

[19 U.S.T. 6259-6282]

UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS

CONVENTION RELATING TO THE STATUS OF REFUGEES

[Seal omitted]

[French version omitted]

T I A S 6577

CONVENTION RELATING TO THE STATUS OF REFUGEES

Preamble

The HIGH CONTRACTING PARTIES,

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

EXPRESSING the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

NOTING that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

HAVE AGREED as follows:

Chapter I

GENERAL PROVISIONS

ARTICLE 1

Definition of the Term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either

(a) "events occurring in Europe before 1 January 1951" or

(b) "events occurring in Europe or elsewhere before 1 January 1951";

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (*a*) may at any time extend its obligations by adopting alternative (*b*) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his
nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.

ARTICLE 2

General Obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

ARTICLE 3

Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

ARTICLE 4

Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

ARTICLE 5

Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

ARTICLE 6

The Term "in the same circumstances"

For the purpose of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

ARTICLE 7

Exemption from Reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

ARTICLE 8

Exemption from Exceptional Measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favor of such refugees.

ARTICLE 9

Provisional Measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

ARTICLE 10

Continuity of Residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there,

the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

ARTICLE 11

Refugee Seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II

JURIDICAL STATUS

ARTICLE 12

Personal Status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

ARTICLE 13

Movable and Immovable Property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

ARTICLE 14

Artistic Rights and Industrial Property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

ARTICLE 15

Right of Association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

ARTICLE 16

Access to Courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment

as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III

GAINFUL EMPLOYMENT

ARTICLE 17

Wage-earning Employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(*a*) He has completed three years residence in the country.

(*b*) He has a spouse possessing the nationality of the country of residence. A refugee may not

invoke the benefit of this provision if he has abandoned his spouse;

(*c*) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

ARTICLE 18

Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

ARTICLE 19

Liberal Professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event,

not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV

WELFARE

ARTICLE 20

Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

ARTICLE 21

Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

ARTICLE 22

Public Education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

ARTICLE 23

Public Relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

ARTICLE 24

Labour Legislation and Social Security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(*a*) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(*b*) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V

ADMINISTRATIVE MEASURES

ARTICLE 25

Administrative Assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

ARTICLE 26

Freedom of Movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

ARTICLE 27

Identity Papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

ARTICLE 28

Travel Documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

ARTICLE 29

Fiscal Charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

ARTICLE 30

Transfer of Assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

ARTICLE 31

Refugees unlawfully in the Country of Refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

ARTICLE 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to

appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

ARTICLE 33

Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

ARTICLE 34

Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI

EXECUTORY AND TRANSITORY PROVISIONS

ARTICLE 35

Co-operation of the National Authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(*a*) the condition of refugees,

(*b*) the implementation of this Convention, and

(*c*) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

ARTICLE 36

Information on National Legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

ARTICLE 37

Relation to Previous Conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII

FINAL CLAUSES

ARTICLE 38

Settlement of Disputes

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

ARTICLE 39

Signature, Ratification and Accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of

ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE 40

Territorial Application Clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for consti-

tutional reasons, to the consent of the Governments of such territories.

ARTICLE 41

Federal Clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment.

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent

to which effect has been given to that provision by legislative or other action.

ARTICLE 42

Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

ARTICLE 43

Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

ARTICLE 44

Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

ARTICLE 45

Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

ARTICLE 46

Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1;

(b) Of signatures, ratifications and accessions in accordance with article 39;

(c) Of declarations and notifications in accordance with article 40;

(d) Of reservations and withdrawals in accordance with article 42;

(e) Of the date on which this Convention will come into force in accordance with article 43;

(f) Of denunciations and notifications in accordance with article 44;

(g) Of requests for revision in accordance with article 45.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments,

DONE at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

[Schedule omitted]